Supreme Court, U.S.
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No. 87-450

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARIE BURTENSHAW, Petitioner

v.

A. A. FERRY, Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

TIMOTHY B. FISHER, ESQ.
P. O. BOX 531, PA ROUTE 940
MT. POCONO, PENNSYLVANIA 18344

QUESTIONS PRESENTED

1) Under Rule 17 of Rules of the Supreme Court, should

Your Honorable Court grant the petition for certiorari in this case if there is no grounds for jurisdiction?

2) Under Pennsylvania procedural law, can a complaint be filed in a civil case after the twenty (20) day time limit, but prior to filing of a praecipe for a judgment non pros?

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COUNTERSTATEMENTS OF THE FACTS

This case arises out of a dispute between the Petitioner and the Plaintiff-Respondent, a contractor named A. A. Ferry, in respect to the replacement of a water pump (worn out Gould pump) with a new Jacuzzi water pump for the Defendant-Petitioner Marie Burtenshaw at her vacation residence in Tannersville, Pennsylvania, in June and July, 1984.

The Petitioner owner contends that this replacement work was not authorized by her and she further contends that all she wished was an estimate from the Respondent. The Respondent did in fact inspect the old Gould pump, found that it was shorted out, and installed a new Jacuzzi water pump; one comparable in service and quality.

This dispute was heard <u>on the merits</u> at all three trial levels of the Pennsylvania Court System, first at a Magistrate's Court

in Mt. Pocono, Pennsylvania, (on September 19, 1984), then at a hearing of arbitrators on June 3, 1985 (three lawyers under the Pennsylvania compulsory arbitration system for civil cases under $10,000.00), and finally by a judge sitting without a jury in the Court of Common Pleas of Monroe County, (Judge Arlington W. Williams on October 22, 1985).

All three tribunals found on the facts for the Respondent contractor and against the Petitioner owner.

Judge Williams in his decision of October 22, 1985, ruled in favor of the Plaintiff repairman and against the Defendant Owner in the amount of Four Hundred Seventy-Five Dollars ($475.00), plus interest.

The Defendant Appellant "appealed" the October 22, 1985 decision of Judge Williams and this appeal was squashed by the

Pennsylvania Superior Court by a per curiam decision on April 30, 1986.

Thereafter, the Petitioner Owner appealed the squashing of appeal by the Superior Court to the Supreme Court of the Commonwealth of Pennsylvania, which Court affirmed without opinion the squashing of appeal by the Pennsylvania Superior Court on January 8, 1987, and thereafter the Defendant Appellant filed a Petition for Reconsideration by the Pennsylvania Supreme Court, which Petition for Reconsideration was denied on May 29, 1987.

The only legal issue that arose in this case was a Pennsylvania procedural issue involving the filing of a complaint in a civil case after the twenty (20) day time requirement, but before the filing of a judgment non pros. In this case, the Petitioner filed on October 25, 1984, a Notice of Appeal and Rule to File a

Complaint within twenty (20) days of service of the Rule. The Respondent filed his Complaint on November 30, 1984, after the twenty (20) day period had expired, but before a judgment non pros had been praeciped or filed by the Petitioner. Judge Arlington W. Williams of the Court of Common Pleas of Monroe County ruled based on existing case law in Pennsylvania, that the Respondent had the right to file his complaint after the deadline, since no judgment non pros had been filed prior to the filing of the Complaint.

SUMMARY OF ARGUMENT

1. THERE IS NO FEDERAL QUESTION OR IMPORTANT LEGAL ISSUE TO BE DECIDED IN THIS CASE AND THEREFORE THERE IS NO JURISDICTIONAL BASIS FOR GRANTING THE PLAINTIFF'S PETITION.

2. UNDER PENNSYLVANIA PROCEDURAL LAW, IT IS PERMISSIBLE FOR A PLAINTIFF LIKE THE RESPONDENT TO FILE HIS COMPLAINT BEYOND THE TWENTY (20) DAY PERIOD ALLOWED, PROVIDED A JUDGMENT NON PROS HAS NOT BEEN FILED IN THE INTERIM.

ARGUMENT

POINT I

THERE IS NO FEDERAL QUESTION OR IMPORTANT LEGAL ISSUE OR ANY OTHER JURISDICTIONAL BASIS FOR THE PLAINTIFF-PETITIONER'S PETITION FOR WRIT OF CERTIORARI

It is a matter of sound judicial discretion of whether or not for the Supreme Court of the United States to grant the review of state court action by granting a Petition for a Writ of Certiorari. Rule 17 of the Rules of The Supreme Court of the United States, effecive June 12, 1980. Durham vs U. S. (Or. 1971) 91 S.Ct. 859, 401 U.S. 481, 28 Led 200.

There must be present in the case a federal question, some constitutional law question, or a federal statute, or a wrong policy decision that must be decided by The Supreme Court in order for The Supreme Court to grant a petition of certiorari. Donaldson vs U. S. (Fla. 1971) 91 S. Ct. 534, 400 U.S. 517, 27 Led 24;

Rice vs Sioux City Memorial Park Cemetary Iowa (1955) 75 St. Ct. 473, 614 349 U. S. 70, 99 L Ed. 897.

In this case, there are simply only fact issues, all of which were decided three (3) times by three (3) different fact finders in the Pennsylvania Court system, except for one minor procedural legal issue, which is addressed in Point II of this Brief. There is no federal questions; there is no federal statute involved in this case; there are no constitutional rights involved in this case, but only a factual dispute between the Petitioner land owner and the Respondent contractor.

There is no question that the work was done; the dispute between the parties was whether or not the work was authorized and whether it was done in compliance with what was ordered by the Petitioner owner.

Consequently, there is no jurisdictional basis to grant the Plaintiff's petition.

POINT II

UNDER RULE 1034(a) OF THE PENNSYLVANIA RULES OF CIVIL PROCEDURE, IT IS PERMISSIBLE FOR A RESPONDENT-PLAINTIFF TO FILE A COMPLAINT LATER THAN THE TWENTY (20) DAY TIME PERIOD ALLOWED, PROVIDED THAT A JUDGMENT NON PROS HAS NOT BEEN FILED INTERIM

The only legal issue that arose in this case was a procedural issue that arose at the Court of Common Pleas level in Stroudsburg, Pennsylvania. The Petitioner-Plaintiff claimed that the Respondent-Defendant was not timely in filing his complaint after service of a Rule on him on October 24, 1984 to file a complaint within twenty (20) days. The Respondent-Defendant filed his complaint on November 30, 1984, beyond the twenty (20) day period.

Under the Pennsylvania Rules of Civil Procedure involving appeals from Magistrate's decisions by a Defendant, such as the Petitioner issued by the Prothonotary of the Court of Common Pleas as was done in this case upon the Plaintiff to file a Complaint within twenty (20) days of the service of the Rule or upon the Plaintiff. PA. R.C.P.J.P. Rule No. 1004 (B). (Page 76, 1987 Edition of Pennsylvania Rules of Court, State and Federal).

The procedure to be followed when a Plaintiff does not file the Complaint within the twenty (20) days after service upon him of the Rule, is governed by Rule 1037(a) of the Pennsylvania Rules of Civil Procedure relating to civil actions heard in the Court of Common Pleas. Malone vs Smith (1981), 18 PA D and C 3rd Reports 682, Lantzy vs Apico Inns of PA Inc. (1977) 25 Lawrence LJ 452.

RULE 1037(a) states verbatim in part as follows:

"If a complaint is not filed within twenty (20) days of the service of the Rule, the Prothonotary, upon Praecipe of the Defendant shall enter a judgment non pros".

(Page 344, 1987 Edition of Pennsylvania Rules of Court, State and Federal) .

The Pennsylvania Courts have interpreted that second sentence of Rule 1037(a) to mean the judgment non pros is not automatic at the time of the twenty (20) day period to file a Complaint. There must be some action by the Defendant, and that action is filing a Praecipe or other legal papers to request a judgment non pros. Homemakers Loan and Discount Company vs Rowe (1977) 4 PA D and C Reports 3rd 167.

The right to a judgment non pros is lost to the Defendant, if the Plaintiff files a late Complaint prior to the Defendant filing his or her Praecipe for

Judgment non pros. Malone vs Smith (1981) 18 PA D & C 3rd Reports 682; Lantzy vs Apico Inns of Pa, Inc. (1977) 25 Lawrence LJ 452.

CONCLUSION

The Respondent A. A. Ferry respectfully requests Your Honorable Court to dismiss or deny the Petition of the Petitioner Marie Burtenshaw for a Writ of Certiorari in the above captioned matter for the reasons heretofore set forth in this Brief.

Respectfully submitted,

Timothy B. Fisher, Esquire
Attorney for Respondent A. A. Ferry
P. O. Box 531, PA Route 940
Mt. Pocono, Pennsylvania 18344

October 6, 1987

LIST OF AUTHORITIES OR CITATIONS

1. Donaldson vs U. S. (Fla, 1971) 910 S.Ct. 534, 400 US. 517, 27 LEd.

2. Durham vs U. S. (Or. 1971) 91 S. Ct. 809, 401 U.S. 481, 280 Led 200.

3. Homemakers Loan and Discount Company vs Rowe (1977) 4 PA D and C Reports 3rd 167.

4. Lantzy vs Apico Ins. of Pa., Inc. (1977) 25 Lawrence LJ 452.

5. PA R.C. P. J. P. Rule No. 1004 (B) (Page 76), 1987 Edition of Pennsylvania Rules of Court, State and Federal.

6. Rule 1037 (a) of PA Rules of Civil Procedure, Page 344, 1987 Edition of Pennsylvania Rules of Court State and Federal.

7. Rule 17 of Rules of U. S. Supreme Court, effective June 12, 1980.

8. Malone vs Smith (1981) 18 PA D & C 3rd Reports 682.

9. Rice vs Sioux City Memorial Park Cemetary Iowa(1955) 75 St. Ct. 473, 614 349 U.S. 70, 99 L Ed. 897.

CERTIFICATE OF SERVICE

I, TIMOTHY B. FISHER, ESQUIRE, hereby certify that on the 6th day of October, 1987, I served three (3) true and correct copies of the foregoing Brief of Respondent to Marie Burtenshaw, One Forrest Lane, Strafford, Pennsylvania 19087, by depositing said copies in the United States Mail, postage prepaid.

TIMOTHY B. FISHER, ESQUIRE
P. O. Box 531, PA Route 940
Mt. Pocono,
Pennsylvania 18344

October 6, 1987

Sworn and subscribed before me
this 6th day of October, 1987.

NOTARIAL SEAL
AGNES MARY FISHER, NOTARY PUBLIC
LEHIGH TOWNSHIP, MONROE COUNTY
MY COMMISSION EXPIRES SEPT. 13, 1990
Member, Pennsylvania Association of Notaries

Appendices A, B, C, D, and E are attached.

APPENDICES

APPENDIX A

SUPREME COURT OF PENNSYLVANIA
Eastern District

June 8, 1987

Marie Burtenshaw
1 Forrest Lane
Strafford, Pa. 19087

RE: A. A. FERRY v. Marie Burtenshaw
Petitioner
NO: 486 E.D. ALLOCATUR DOCKET 1986

Dear Ms. Burtenshaw:

This is to advise you that the following Order has been endorsed on your "Petition and Plea for Reconsideration of Decision/Verdict," filed in the above captioned matter:

"May 29, 1987.

Petition for Reconsideration denied.

Per Curiam."

Very truly yours,

(signed) Patrick Tassos

PATRICK TASSOS
Deputy Prothonotary

/pj
cc: Timothy B. Fisher

APPENDIX B

SUPREME COURT OF PENNSYLVANIA
Eastern District

February 11, 1987

Ms. Marie Burtenshaw
1 Forrest Lane
Strafford, PA 19087

Re: A. A. Ferry v. Marie Burtenshaw,
Petitioner
No. 486 E. D. Allocatur Docket 1986

Dear Ms. Burtenshaw:

This is to advise you that the following order has been endorsed on the Petition for Allowance of Appeal filed in the above-captioned matter:

January 8, 1987

PETITION DENIED

Per Curiam

Very truly yours,

(signed) Patrick Tassos
Deputy Prothonotary

PT:ejh
cc. Timothy Fisher, Esq.

APPENDIX C

IN THE SUPERIOR COURT OF PENNSYLVANIA

A. A. FERRY	:	PHILADELPHIA DISTRICT
	:	NO. 2194 Civil 1984
v.	:	C.P. Civil-Monroe NO. 3219 Philadelphia, 1985

MARIE BURTENSHAW
Appellant

ORDER OF THE COURT

AND NOW, this 30th day of April, 1986, the motion of appellee to quash the appeal is granted.

PER CURIAM

Per Curiam

APPENDIX D

IN THE COURT OF COMMON PLEAS OF THE 43rd JUDICIAL DISTRICT, COMMONWEALTH OF PENNSYLVANIA, MONROE COUNTY -- CIVIL

A. A. FERRY Plaintiff	:	NO. 2194 CIVIL 1984
vs	:	
MARIE BURTENSHAW Defendant	:	APPEAL FROM ARBITRATION

D E C I S I O N

AND NOW, October 22, 1985 we find in favor of the Plaintiff and against the Defendant in the amount of Four Hundred Seventy-five Dollars ($475.00) with interest from July 4, 1984.

BY THE COURT:

(signed) Arlington W. Williams

Senior Judge

cc: Timothy Fisher, Esq.
Marie Burtenshaw

APPENDIX E

IN THE COURT OF COMMON PLEAS OF THE 43rd JUDICIAL DISTRICT OF PENNSYLVANIA
MONROE COUNTY BRANCH

A. A. FERRY	:	No. 2194 Civil 1984
	:	
vs.	:	Notice of Award
	:	
MARIE BURTENSHAW	:	

To Timothy B. Fisher, Esq., Attorney for Plaintiff Please note that the arbitrators in the above entitled case have filed their award in this office on May 31, 1985, and have Awarded and found for the Plaintiff in the sum of $475.00 + costs + interest from July 4, 1984.

Joyce A. Reese
Prothonotary

By: (signed) Marsha Wasserman
Deputy

June 3, 1985